No. 11635.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COAST VAN LINES, INC.,

Appellant,

vs.

BERT ARMSTRONG, L. A. CHARETTE, KING FISHER, DAVE GARCIA, EARL GRAHAM, IRA C. HOLDER, LOUIS KANIER, EMORY KEY, RICHARD MAGNUS, LEON T. McGROSSEN, GEORGE W. PETERSON, THOMAS P. REMUS, JOE P. SEVEDRA, SIDNEY H. SMITH, LOUIE VAUGHN, NOBLE F. WHITE, HAROLD N. WHEELER and MORRIS WOLF,

Appellees.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Statement Re Jurisdiction.

This is an appeal from the final judgment of the District Court of the United States for the Southern District of California, Central Division, entered December 3, 1946 [R. 28] for overtime compensation to appellees, liquidated damages, and attorneys' fees. [R. 2-6, 27-28.] Notice of appeal was filed March 12, 1947. [R. 32.] The jurisdiction of the District Court was invoked under Section 24 of the Judicial Code, as amended (28 U. S. C. A., Section 41) and under the Fair Labor Standards

Act of 1938. (29 U. S. C. A., Section 216.) [Complaint, Par. III; R. 3-4.] The jurisdiction of this Court is invoked under Section 128 of the Judicial Code, as amended. (28 U. S. C. A., Section 225.)

Statutes Involved.

The Statutes involved are the Fair Labor Standards Act of 1938, and more particularly Sections 6, 7, 13 and 16 of said Act (29 U. S. C. A., Sections 206, 207, 213 and 216) and the Interstate Commerce Act, as amended. (49 U. S. C. A. Supp., Section 304.) The pertinent provisions of said Acts are set out in Appendix A, annexed hereto.

Statement of the Case.

This appeal is from a judgment of the District Court adjudging that appellees are entitled to recover from appellant the aggregate amount of ten thousand seven hundred forty and 48/100 Dollars ($10,740.48) for overtime compensation and liquidated damages held to be due them under the Fair Labor Standards Act of 1938, and the additional sum of one thousand dollars ($1,000.00) as attorneys' fees for appellees' attorneys of record. [R. 27-28.] The amount of actual overtime and liquidated damages adjudged to be due each of the appellees is set forth in the conclusions of law [R. 21-22] and in Schedule "A" annexed to the findings of fact [R. 25-26], and these several amounts are also stated in the judgment. [R. 27-28.]

The Pleadings.

It is alleged in the amended complaint that each of the appellees was employed by appellant, since August 15, 1942, for various periods of time and at various wage rates [R. 3], and that since said date and on frequent occasions each of the appellees performed services for appellant in excess of forty (40) hours per week, for which appellant failed to pay the compensation provided by the Fair Labor Standards Act [R. 4-5], the amounts being unknown to appellees. [R. 5.]

It is also alleged in the complaint that appellant is a California corporation and that at all times mentioned therein was engaged in the business of packing, crating, storing, shipping, handling and working on goods, wares, products, commodities and merchandise, the greater part of which was transported or otherwise disposed of among the several States and from the State of California to places outside thereof. [R. 4.]

In its answer to the amended complaint appellant admitted that it was and is engaged in the business of packing, crating, storing, shipping, handling, and working on goods, wares, products, commodities and merchandise at the times mentioned in the amended complaint. [R. 7.] By way of special defense, appellant alleged in its amended answer that both appellees and appellant are exempt from the application of the provisions of the Fair Labor Standards Act for the following reasons, to-wit: (1) that, at all times mentioned in said complaint, appellant was a service establishment, the greater part of whose servicing was and is in intrastate commerce, and that appellees and each of them were employed by appellant to perform, and performed, work and services in such

service establishment [R. 8-9]; (2) that, at all such times, appellant was a retail establishment, the greater part of whose selling was and is in intrastate commerce, and that appellees and each of them were employed by appellant to perform, and performed, work and services in such retail establishment [R. 9-10]; and (3) that appellees and each of them were employed by appellant to perform, and performed work, and services, a substantial portion of their time, in a business and at occupations necessary to the transportation of goods in interstate commerce, and that appellees and each of them devoted a substantial portion of their time and activity to work necessary to the safety of operations and equipment in interstate commerce. [R. 10-11.]

Findings.

The District Court made elaborate findings of fact [R. 13-26] but only those findings deemed pertinent are summarized herein, as follows:

> (1) "That appellant, at all times since August 15, 1942, was and is a California corporation duly authorized to do business in the State." [Finding II; R. 13.]
>
> (2) "That * * * since August 15, 1942, defendant (appellant) has been engaged in the business of packing, crating, storing, handling and working on goods, wares, commodities and merchandise, a considerable part of which was transported or otherwise disposed of among the several States and from the State of California to places outside thereof * * * and for the purpose of the Findings the Court adopts the figures arrived at on an average taken from an analysis of the defendant's records presented in defendant's testimony, which showed

55⅓ per cent intrastate and 44⅔ per cent interstate business." [Finding IV; R. 14-15.]

(3) "That * * * each of them (appellees) has been in the employ of the defendant, each has been engaged and employed in handling and otherwise working on goods, and in a business and at an occupation necessary to the transportation of goods in interstate commerce * * * during a substantial portion of the time in each work week." [Finding V; R. 15.]

The Court made the following negative findings:

(4) "That it is not true * * * that defendant was or is a service establishment, or that the greater part of defendant's servicing was or is in intrastate commerce, or that plaintiffs * * * were employed as employees of a service establishment, or that they engaged in a service establishment * * * the greater part of whose servicing was or is in intrastate commerce." [Finding X; R. 17.]

(5) "That it is not true * * * that defendant was * * * or is a retail establishment, or that said plaintiffs * * * were, or that any of them was, employed as employees in a retail establishment, the greater part of whose selling was and is in intrastate commerce, but on the contrary, the Court finds that the substantial portion of each of said plaintiff's work and activities * * * was devoted to interstate shipments and activities." [Finding XII; R. 18.]

But in the same Finding (No. XII) the Court also found

"that it is true * * * that * * * the intrastate shipments of defendant corporation averaged a larger portion of its business than the interstate shipments." [R. 18.]

(6) "That it is not true * * * that said plaintiffs, or any of them * * * devoted a substantial portion of his time to the safety of operations and equipment * * * in such manner as to be exempt from the application of the provisions of the Fair Labor Standards Act of 1938, or to come within the provisions of Section 13(b) of the Act, or to come within that class of employees as to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act." [Finding XIII; R. 19.]

These positive and negative findings are in obvious conflict as to the vital issues of this case, as will fully appear later herein. It is sufficient at this time to merely note the conflict. Moreover, the negative findings are not supported by, but are contrary to, the evidence.

Concisely stated, appellant's business consisted, mainly, in the transportation and storage of goods, mainly household goods, wares and merchandise both intrastate and interstate. In connection with, incidental to and as a part of its main business it rendered services to its customers consisting of the packing, crating, hauling and delivering of such goods, household goods, wares and merchandise to and from common carriers and to and from its warehouses to, or for, its customers. The principal part of its business, that is, 55⅓ per cent thereof, was intrastate. [Finding IV; R. 14-15.]

Questions Involved.

The principal questions involved in this appeal are briefly stated as follows:

1. Was appellant a service establishment the greater part of whose servicing was in intrastate commerce, and, by reason thereof, were appellant and appellees exempt from the application of the provisions of the Fair Labor Standards Act?

2. Was appellant a retail establishment the greater part of whose selling was in intrastate commerce, and, by reason thereof, were appellant and appellees exempt from the application of the provisions of the Fair Labor Standards Act?

3. Were the appellees engaged, a substantial portion of their work time, in work for appellant involving safety of operations and equipment in interstate commerce and were they subject to the provisions of the Interstate Commerce Act (49 U. S. C. A. Supp., Section 304(a)(3)) and, by reason thereof, were appellant and appellees exempt from the application of the provisions of the Fair Labor Standards Act?

As already noted, the questions involved in this appeal were raised by the special defenses set up in the answer of appellant to the amended complaint. [R. 8-11.]

Specification of Errors.

Appellant relies upon each and all of the errors specified in its "Statement of Points Upon Which Appellant Intends to Rely" [R. 33-36], but more especially upon the following, to-wit:

1. The District Court erred in holding that appellant was not a service establishment the greater part of whose servicing was in intrastate commerce.

2. The District Court erred in holding that appellees were not employed to perform and did not perform, a substantial portion of their time, work and services in a service establishment.

3. The District Court erred in holding that appellant was not a retail establishment the greater part of whose selling was in intrastate commerce.

4. The District Court erred in holding that appellees were not employed to perform and did not perform, a substantial portion of their time, work and services in a retail establishment.

5. The District Court erred in holding that appellees were not engaged, a substantial portion of their time, in performing work and services for appellant involving safety of operations and equipment in interstate commerce.

6. The District Court erred in holding that appellant was not exempt from the application of the provisions of the Fair Labor Standards Act of 1938 because of the following facts: (a) it was a service establishment the greater part of whose servicing was in intrastate commerce; (b) it was a retail establishment the greater part of whose selling was in intrastate commerce, and (c) its employees, the appellees, were employed to perform and performed work and services, a substantial portion of their time, involving safety of operations and equipment in interstate commerce.

7. The District Court erred in holding that appellees were not exempt from the application of the provisions of

the Fair Labor Standards Act of 1938 because, as the Court erroneously found: (a) they were not employed to perform and did not perform, a substantial portion of their time, work and services in a service establishment the greater part of whose servicing was in intrastate commerce; (b) they were not employed to perform and did not perform, a substantial portion of their time, work and services in a retail establishment the greater part of whose selling was in intrastate commerce; and (c) they were not employed to perform and did not perform, a substantial part of their time, work and services involving safety of operations and equipment in interstate commerce.

Summary of Argument.

Appellant was a service establishment and a retail establishment the greater part of whose servicing and selling was in intrastate commerce within the meaning of the Fair Labor Standards Act of 1938.

Appellees were employed by appellant to perform, and in fact, performed, services, a substantial portion of their time, in a service establishment or a retail establishment, the greater part of whose servicing and selling was in intrastate commerce.

Appellees were employed by appellant to perform and performed work and services, a substantial portion of their time, involving safety of operations and equipment in interstate commerce.

For the foregoing reasons, appellant was exempt from the application of the wage and hour provisions of the Fair Labor Standards Act of 1938, hence the judgment of the District Court is erroneous and should be reversed.

ARGUMENT.

I.

Appellant Was a Retail or Service Establishment the Greater Part of Whose Selling or Servicing Was in Intrastate Commerce, and Therefore Both Appellant and Appellees Were Exempt From the Application of the Provisions of the Fair Labor Standards Act of 1938.

The terms "retail establishment" and "service establishment" are not defined in the Fair Labor Standards Act of 1938, hereinafter referred to as "the Act." Nor have those terms been judicially defined in language broad enough to include all such establishments. The Courts have, as a rule, limited the definitions of those terms to the facts involved in each particular case under consideration.

The term "service establishment" has been construed by the Court to include the following businesses and establishments: *Barber Shops* (*Fleming v. Kirschbaum Co.,* 124 F. (2d) 567, aff. 316 U. S. 517; *Schmidt v. People's Tel. Union,* 138 F. (2d) 13; *Walling v. Kerr,* 47 Fed. Supp. 852; *Strand v. Garden Valley Tel. Co.,* 51 Fed. Supp. 898; *New Mexico Public Service Co. v. Engel,* 145 F. (2d) 636, 641); *Beauty Parlors* (*Fleming v. Kirschbaum,* 124 F. (2d) 567; *Schmidt v. People's Tel. Union,* 138 F. (2d) 13; *N. M. Pub. Ser. Co. v. Engel,* 145 F. (2d) 636, 641); *Shoe Shining Parlors* (*Fleming v. Kirschbaum Co.,* 124 F. (2d) 567; *Schmidt v. People's Tel. Union,* 138 F. (2d) 13; *Stucker v. Roselle,* 37 Fed. Supp. 864; *N. M. Pub. Ser. Co. v. Engel, supra*); *Shoe Repairing Shops* (*Walling v. Kerr,* 47 Fed. Supp. 852); *Tailor Shops* (*Walling v. Kerr,* 47 Fed. Supp. 852; *Strand*

v. Garden Valley Tel. Co., 51 Fed. Supp. 898); *Clothes Pressing Clubs* (*Fleming v. Kirschbaum Co., supra*; *Schmidt v. People's Tel. Union, supra*; *Stucker v. Roselle, supra*); *Laundries* (*Fleming v. Kirschbaum, supra; Schmidt v. People's Tel. Union, supra; Strand v. Garden Valley Tel Co., supra*); *Linen Supply Service Establishment* (*Lonas v. National Linen Service Corp.,* 136 F. (2d) 433, cert. denied 320 U. S. 785; *Hunt v. National Linen Service Corp.,* 178 Tenn. 262, 157 S. W. (2d) 608); *Automobile Repair Shops* (*Fleming v. Kirschbaum Co., supra; New Mexico Pub. Ser. Co. v. Engel, supra*); *Restaurants* (*Schmidt v. People's Tel. Union,* 138 F. (2d) 13); *Hotels* (*Schmidt v. People's Tel. Union, supra*; *Strand v. Garden Valley Tel. Co.,* 51 Fed. Supp. 898); *Garages* (*Schmidt v. People's Tel. Union,* 138 F. (2d) 13; *Strand v. Garden Valley Tel. Co.,* 51 Fed. Supp. 898); *Funeral Homes* (*Schmidt v. People's Tel. Union,* 138 F. (2d) 13); *Window Cleaning Establishments* (*Martino v. Michigan Window Cleaning Co.,* 145 F. (2d) 163); and *Optometrists* (*Snavely v. Shugart,* 45 Fed. Supp. 722). It is thus seen that the term "service establishment" has been judicially construed to include a wide variety of services rendered to persons, and to property.

In the Annotation to *Lonas v. National Linen Service Corporation,* 150 A. L. R. 697 (136 F. (2d) 433), at page 700, the annotator says:

> " 'Service establishments' whose employees are excepted from the operation of the act are establishments which, like retail establishments, deal with the general consuming public—as distinguished from some specialized field of business activity—selling, however, services instead of goods. The services rendered must, as a rule, be rendered to the ultimate con-

> sumer thereof, and not to one who avails himself thereof as a necessary step or ingredient in the processing or manufacturing of goods for interstate commerce * * * although in some cases rendition of services even to industrial and commercial concerns, as distinguished from private consumers, was held to make the concern a 'service establishment,' particularly where there was no necessary relation between the service rendered and the interstate character of the business of the customer served. See, for example, Lonas v. National Linn Serv. Corp. (C. C. A. 6th) (reported herewith) *ante,* 697; Martino v. Michigan Window Cleaning Co. (1943; D. C.), 51 F. Supp. 505; Hunt v. National Linen Serv. Corp. (1941), 178 Tenn. 262, 157 S. W. (2d) 608."

In *Guess v. Montague,* 51 Fed. Supp. 61, the employer operated a local repair shop and sold machinery and supplies to individual customers, and the employer's out of State business was less than 5% of total sales. The Court held that the employer was exempt because he operated a retail or service establishment the greater part of whose selling or servicing was in intrastate commerce. In respect to the meaning of the term "service establishment" the Court said, at page 65:

> "The term 'service establishment', as used in the Act, undoubtedly has reference to a business in which the owner thereof renders some character of service, at an established location, to members of the general public, in consideration of a charge to be made therefor. Establishment is undoubtedly used in the sense of business. However, it is not every business that falls within the execption. To be exempt the business must be one where service is rendered to

> others as a general business of the owner thereof and not merely some service which is purely incidental to another character of operation. The word service, like many other English words, has many meanings. In determining the sense in which the word is used resort must be had of necessity to the context. Here there can hardly be any escape from the conclusion that the sense in which the word service was used in the Act is that of supplying labor or skill for the benefit of others as a business, such as was the case in the instant controversy. Since the defendant was operating a service establishment the greater part of whose servicing was in intrastate commerce the Fair Labor Standards Act is not applicable and the plaintiffs' case must fail."

In *Murphy v. Georgia-Aero Tech.,* 49 Fed. Supp. 982, the Court said, in respect to what is a "service establishment" at page 985:

> "The service establishment contemplated by the section (Section 13(a) (2) of the Act) is one that, somewhat like a retail store, serves customers indiscriminately as a business and performs work or labor on the person or the property of the customer or serves his physical needs or desires * * *."

In view of the foregoing judicial statements as to what constitutes a service establishment, the following record facts, in addition to those already stated, must be noted.

The appellant was not a mere hauler of dry freight. It was engaged in the business of packing, crating, storing, handling and working on goods limited, almost exclusively, to household goods. (Finding No. IV.) That finding (No. IV) is correct as far as it goes, but to give the finding its full meaning and effect in respect to

the service establishment exemption claimed by the defendant, one must analyze and understand the evidence upon which this finding is predicated.

It might throw further light on the subject to point out that near the close of the period of time covered by appellees' complaint, there was a complete change of ownership and management of the defendant corporation. Consequently, the appellant was at a great disadvantage in producing testimony favorable to itself during the period in question. However, appellees' own witnesses gave testimony favorable to the appellant in this regard.

Thus, Estel C. Jamison, a former vice-president, stockholder and superintendent of appellant [R. 43, lines 12 to 18] testified that appellant handled no freight other than household goods of Navy personnel. [R. 45, lines 18 to 20.] Exhibit "C", which is the most accurate evidence in the record, indicates that over 88½% of appellant's business consisted of handling household effects for private individuals. Harry C. Retzer, a former sales manager of appellant [R. 49, line 30] and former manager of its operations [R. 50, line 14] testified that in addition to the mere physical moving and storing of goods, numerous other services and courtesies were extended to appellant's customers as a regular part of its business. For example, wardrobe service was recommended [R. 70, line 30] as were plumbers [R. 71, lines 1 to 5], insurance coverage and changes [R. 71, line 6 to 13], treatment of rugs [R. 71, lines 26 and 27] and treatment of articles for preservation against moths. [R. 71, lines 28 and 29.]

In these and many other ways appellant rendered service to its customers beyond the mere transportation and stor-

age of inanimate objects. Appellant consulted with customers with regard to their personal belongings, advised selling rather than shipping in some cases, and made appraisals in such instances [R. 116, lines 25 to 30]; advised about utility disconnections [R. 116, lines 30 to 32]; advised about special handling of radios [R. 117, lines 1 to 4]; advised about cleaning, sterilizing and moth proofing of rugs and woolen items [R. 117, lines 6 to 11] and upholstered furniture [R. 117, lines 11 to 15], and arranged with cleaners to have the customer's furniture and belongings cleaned. [R. 119, lines 1 and 2.] If a customer decided to sell goods in storage rather than to ship or reship them, appellant arranged for appraisers or furniture dealers to appraise or bid on the articles. [R. 120, lines 13 to 15.] When furniture was redelivered to a customer, the rugs were wiped off [R. 121, line 24], the upholstery dusted [R. 121, line 25], and the furniture rubbed down. [R. 121, lines 25 and 26.] In fact, the defendant helped hang drapes and pictures [R. 122, lines 5 and 6] and even unpacked and arranged the customer's furniture in its new location. [R. 122, lines 21 to 31.]

It cannot be doubted upon fair consideration of the facts shown by the record in this case, and the law applicable thereto, that appellant was a service establishment, selling services instead of goods; and that it served indiscriminately any member of the public desiring its services by supplying labor and skill to their property and for their benefit for hire. Summarized, briefly, appellant's business consisted principally of the following services: It supplied labor, skill and services to its customers, indiscriminately and for hire, consisting of the packing, crating, handling, working on, hauling, shipping, storing and transporting of their goods (principally house-

hold goods and effects), wares and mechandise from and to their customers' homes, from and to carriers, and from and to its storage warehouses.

The trial court found that

> "(appellant) has been engaged in the business of packing, crating, storing, shipping, handling and working on goods, wares, produces, commodities and merchandise" and that the evidence as to appellant's business "showed 55⅓ per cent intrastate and 44⅔ per cent interstate business." [R. 14-15.]

This finding required the legal conclusion that appellant was a service establishment, and that both appellant and appellees were exempt from the application of the wage and hour provisions of the Act by reason of Section 13(a)(2) thereof (29 U. S. C. A. Section 213(a)(2)) which provides:

> "The provisions of Sections 206 and 207 (the wage and hour provisions) of this title shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * *"

In view of the finding of the trial Court, last above quoted, it was error for the Court to hold that appellant was not a service establishment the greater part of whose servicing was in intrastate commerce.

It should be noted in this connection that the phrase "the greater part of whose selling and servicing", as used

in Section 13(a)(2) of the Act (29 U. S. C. A. Section 213(a)(2)), refers and applies to the employer and not to the employee. This phrase was construed in *Wood v. Central Sand & Gravel Co.,* 33 Fed. Supp. 40, at page 46, as follows:

> "Whether Section 13(a)(2) applies must be determined, in each case, upon all the facts shown in the record. Certain common-sense considerations, however, are appropriately applied as criteria in all cases. Among these, it is obvious that the applicability of Section 6, covering minimum wages, and of Section 7, covering maximum hours, depends upon the nature of the *employment of the individual employee;* while the exemption provided in Section 13(a)(2) depends upon the nature of the *business conducted by the employer.* Another obvious distinction, between Section(s) 6 and 7 on the one hand and Section 13(a)(2) on the other, is that, under the former, *some* employees in any given business enterprise may be covered by the Fair Labor Standards Act and others not; while, under the latter, *all* the employees of the industry are exempted, if any are." (Italics, the Court's.)

The nature of appellant's business having been shown by the evidence and findings to constitute appellant a service establishment, and the Court having found that 55⅓% of its business was intrastate, the Court should have concluded as a matter of law that appellant and appellees were exempt from the application of the wage and hour provisions of the Act, and, therefore, judgment should have been for appellant.

II.

Appellees Engaged in Work and Actives for Appellant, a Substantial Portion of Their Time, Involving Safety of Operations in Interstate Commerce, Hence the Overtime Provisions of the Fair Labor Standards Act of 1938 Were Not Applicable to Appellees, or to Appellant.

Appellees were employed by appellant as drivers of trucks, helpers, packers, loaders, mechanics and checkers and their work and activities, as such, a substantial portion of their time, involved safety of operations in interstate commerce. The overtime provisions of the Fair Labor Standards Act were, therefore, not applicable to appellees, by reason of Section 13(b) of that Act (29 U. S. C. A. Section 213(b)), and the provisions of Section 304 of Title 49 U. S. C. A. giving jurisdiction of such employees to the Interstate Commerce Commission.

Section 13(b) of the Fair Labor Standards Act (29 U. S. C. A. Section 213(b) provides as follows:

> "The provisions of Section 207 of this title shall not apply with respect to (1) any employee with respect to whom the Interstate Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49; * * *"

Section 304 of Title 49 U. S. C. A. (Motor Carriers Act) provides:

> "(a) It shall be the duty of the (Interstate Commerce) Commission—
>
> "(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable require-

ments with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

Appellant comes within the scope of subdivision (1) of Section 304(a) of Title 49 U. S. C. A., *supra,* being a common carrier of property for hire.

The Interstate Commerce Commission, following hearings, has held that the following employees of motor carriers are engaged in activities involving safety of operations in interstate commerce and are within the jurisdiction of the Commission, to wit:

(1) The drivers of motor vehicles engaged in transporting passengers or property in interstate and foreign commerce. (13 M. C. C. 481, 1 Fed. Car. Cases, Par. 7344; *United States v. American Trucking Associations, Inc.,* 310 U. S. 534.)

(2) Helpers, that is, those who ride on such vehicles and who assist in loading and unloading and other activities, but who do not drive. Such helpers include those who dismount on approach to railroad crossings and flag the driver across the tracks; or when the vehicle is being turned around on a busy highway; or when it is entering or emerging from a highway; or in placing flags, etc. when a breakdown occurs; or in changing tires; or, in general, whose duties affect actual safety of operations. (*Ex parte M. C. 2,* March 4, 1941.)

(3) Loaders hired by motor carriers to load, unload, or transfer freight between motor vehicles. (*Id.*)

(4) Mechanics whose primary duties are to keep the motor vehicles so used in good, safeworking condition. (*Id.*)

In respect to these employees, it was said in *Walling v. Silver Bros. Co.,* 136 F. (2d) 168, at page 170:

> "Stated differently, the Bayley case (Southern Gasoline Co. v. Bayley, 319 U. S. 44, 63 S. Ct. 917) holds that Congress withdrew from the coverage of the (Fair Labor Standards) Act employees of private carriers, that is, drivers, helpers, mechanics and loaders regardless of whether the Interstate Commerce Commission regulates their activities."

In the late case of *Levinson v. Spector Motor Service,* 67 S. Ct. 931, the Supreme Court held that a "checker" or "terminal foreman", a substantial part of whose activities consisted of doing, or immediately directing, the work of loading freight for an interstate motor carrier, is excluded from the overtime provisions of the Fair Labor Standards Act; and that such employee is subject to the jurisdiction of the Interstate Commerce Commission.

In the *Spector* case the Supreme Court gave full effect to the findings of the Commission, saying in respect thereto:

> "We have set forth the Commission's record of supervision over this field of safety of operation * * * to demonstrate the high degree of its competence in this specialized field which justifies reliance upon its findings, conclusions and recommendations." (*Id.* p. 945.)

The Supreme Court also said in the *Spector* case (*Id.* page 945) that to be exempt from the coverage of the Fair Labor Standards Act employees must devote a substantial part of their *activities,* as distinguished from *time,* in safety of operations in interstate commerce. While the Court does not define the word "substantial", it states in this connection (*Id.* page 944):

> "It is the *character* of the activities rather than the proportion of either the employee's time or of his activities that determines the actual need for the Commission's power to establish reasonable requirements with respect to qualifications, maximum hours of service, safety of operations and equipment * * * So here it is enough for the purposes of this case that a substantial part of the petitioner's activities consisted of the doing or immediate direction of the very kind of activities of a loader that are described by the Commission as directly affecting safety of operation. The petitioner's activities thus affected safety of operation, *although it does not appear what fraction of his time was spent in activities affecting safety of operation.*" (Italics ours.)

The Court thus emphasizes character of activities, not time, as the controlling factor in determining whether an employee is engaged in safety of operations within the meaning of the Motor Carrier Act. (49 U. S. C. A. Section 304.)

In *Walling v. Silver Fleet Motor Express,* 67 Fed. Supp. 846, tried by Circuit Judge Miller of the Sixth Circuit Court of Appeals, the coverage of the exemption

provided by Section 13(b) of the Fair Labor Standards Act (29 U. S. C. A. Section 213(b)) was held to include, in addition to the employees mentioned, *supra,* yard drivers, city collection and delivery drivers, and trailer and body mechanics who inspect and repair such defects as might normally result in accident on the highway if not discovered and repaired. In this connection the Court said, at page 854 (*id.*):

> "I accordingly rule that drivers (including yard drivers and C and D drivers), drivers' helpers, mechanics, and loaders perform work which directly affects the safety of operation and are exempt from the provisions of the Wage and Hour Law. Loaders include the chief loader, assistant loader and loaders, in that the crew works as a unit and the supervision and overall inspection and approval of the work rest upon the chief loader and assistant loader. * * * I see very little difference between inspection and proper maintenance of the tractor and motor and the inspection and proper maintenance of the trailer where such work remedies defects which have a direct causal connection with the safe operation of the unit as a whole. Accordingly, the work of trailer mechanics and body mechanics in inspecting trailers and repairing such defects thus discovered as might normally result in an accident on the highway if not discovered and repaired, and the proper maintenance of the trailers to prevent such defects from coming into existence, also have a direct causal connection with the safety of operation and are within the exempt provision."

The Court then said, in respect to the time and activities of an employee necessary to bring such employee within the exemption provided by Section 13(b)(1) of the Fair Labor Standards Act, at page 854:

> "Proceeding on the basis of the foregoing rulings, there is still presented the question of whether or not an employee is exempt who spends part of his time each week in exempt activities and part of his time each week in non exempt activities. The Administrator's contention that such an employee is not exempt unless he spends fifty per cent of his time in the exempt activities is not sustained by the ruling heretofore made by the Circuit Court of Appeals for this Circuit. It was stated in Walling v. Morris, 6 Cir., 155 F. 2d 832, following Fletcher v. Grinnell Bros., 6 Cir., 150 F. 2d 337, 340, and West Kentucky Coal Co. v. Walling, 6 Cir., 153 F. 2d 582, that such an employee is in the exempt classification if he devotes a substantial part of his time during the work week to work of the exempt classification. In Richardson v. James Gibbons Co., 4 Cir., 132 F. 2d 627 (affirmed at 319 U. S. 44, 63 S. Ct. 917, 87 L. Ed. 1244, without discussion of that issue), the Circuit Court held that an employee who devoted twenty-five per cent of his time during the work week to exempt activities was exempt from the provisions of the Wage and Hour Law. In Walling v. Comet Carriers, *supra,* the Circuit Court of Appeals stated without it being necessary to so rule, that one day's work in any one week could reasonably be considered substantial."

DETAILED ACTIVITIES OF APPELLEES.

The activities and work of the appellees, as disclosed by their own testimony, shows that they, and each of them, come within the scope of the authorities relating to safety of operations, *supra.*

Bert Armstrong: Furniture crater for entire term of employment; crated goods for shipment. [R. 78.] Loaded only railroad cars, not vans, all in interstate commerce. [R. 79.]

Emory Key: Packer and driver after March 1, 1944. [R. 84.] Drove 2½ to 3 hours per day [R. 86], 20% loading and 10% driving. [R. 91.]

Earl Graham: Loader, packer, unloader, unpacker. [R. 175.] Drove truck 3 days per week for 4 months [R. 176], all interstate.

Louis Kanier: Warehouseman; no loading or driving. Did some unloading. [R. 181.]

Thomas P. Remus: Did weighing and stencilling, and some unloading, 65% interstate. [R. 183.]

Joseph Savedra: Crater for 3½ months [R. 186], and thereafter helper on line van assignment truck for 9 months. [R. 188.]

George W. Peterson: Packer and driver [R. 189], all interstate. [R. 190.]

Louie Vaughn: On cross-country truck 8 weeks. [R. 198.] Thereafter packer 10% to 15% of time driving, and packer remainder. [R. 202.]

Leon T. McRossen: Packer 80% [R. 204], loader 5% to 10% [R. 209], and driver 10% to 15% of time. [R. 209.]

Ira C. Holder: Helper on truck 1943 to 1944 [R. 211-212] to Sept., 1945 [R. 213], then warehouseman [R. 213], 20% in truck [R. 214], 20% loading and unloading [R. 214] and 60% packing. [R. 214.]

Noble F. White: Helper on truck [R. 216], driving part of the time [R. 217], and loading and unloading remainder without giving percentage.

David Garcia: Hauling freight all the time [R. 218]; goods came from out of state. [R. 220].

Morris Wolf: Crater and packer [R. 221], mostly for interstate shipment. [R. 221.]

Harold N. Wheeler: Mechanic's helper March to December, 1944 [R. 223]; thereafter reported mechanical defects, changed flat tires, exchanged and overhauled motors and fixed brakes. [R. 225-226.] Before becoming mechanic's helper gassed and oiled trucks.

Richard Magnus: Packer 75% to 80% of time, loading and unloading 5%, driving truck 15%. [R. 230.]

L. A. Charette: Packer all the time. [R. 236-237.]

King Fisher: Packer, mover, handler of household goods of Navy personnel. [R. 267.]

Sidney H. Smith: Packer and driver [R. 269] for four months [R. 270] then trucking freight to Long Beach. [R. 271.]

In this connection Harry Retzer, appellant's witness and its former manager of operations, testified that packers actually did 90% packing and 10% driving. [R. 58.] Ernest R. Farmer, its former dispatcher and warehouse manager, confirmed Mr. Retzer's testimony. [R. 75.]

Maynard Diegel, appellant's assistant secretary and manager [R. 136], gave testimony concerning the amount of time spent by each of certain appellees in activities intrastate and interstate, respectively [R. 273-287], filing numerous supporting documents. The trial court permitted Mr. Diegel to summarize the contents of these documents and to file the summary as appellant's (defendant's) Exhibit "P". [R. 284.] In respect thereto Mr. Diegel testified as follows:

> "The Witness: The total packing time per week per man in hours—Magnus had nine and a quarter hours, Vaughn nine and a quarter hours, White three hours, Key three hours, Holder ten and a quarter hours; Garcia nine and a half hours. That is for a week of five days, 40 hours, and this is all (407) the supporting data.
>
> Q. By Mr. Moore: And these are the supporting documents which appear in summarized form in this document? A. Yes.
>
> Mr. Moore: I ask these be marked for identification.
>
> The Court: Yes.
>
> The Clerk: As one exhibit?
>
> The Court: Yes.
>
> The Clerk: That will be Defendant's Exhibit P for identification." [R. 284.]
>
> * * * * * * * *
>
> "Q. By Mr. Moore: Mr. Diegel, have you made any similar examinations for other persons covering other employees who were not on the payroll in July of 1945? A. Yes, we have.
>
> Q. Have you that with you? A. Yes, sir. This is a similar report and it shows * * *

Q. Does it have the supporting documents with it in the same fashion as you described the first one? (408) A. It has with the exception of the cartage ticket sheets which we were unable to produce." [R. 285.]

* * * * * * * *

"Q. By Mr. Moore: Mr. Diegel, going back to the period in July, 1945, can you tell us whether or not there has been a study made of the records of the corporation to determine for the work done by the various members of the—for the various plaintiffs, a determination of the amount of business they did or hauled or handled in intra- or interstate commerce? A. Yes. At the same time we were preparing the other records and studies on this July of 1945, we made a list of each one of the drivers and helpers who worked for us at that time and we find that in the case of Key—

Mr. Beardsley: Same objection to this line of questioning (410).

The Court: It may be so understood. Same ruling.

Q. By Mr. Moore: Go ahead.

The Witness: That he performed 32 jobs in that month as per this list. 22 of them were intrastate movements and ten of them were interstate movements.

In the case of Noble White, who was Key's partner, it is the same: 22 intrastate and 10 interstate.

In the case of Magnus there were 49 way bills in the study. 25 of them were intrastate jobs and 24 were interstate jobs.

In the case of Vaughn there were 45 in the study. 23 were intrastate and 22 were interstate.

In the case of Holder there were 52 jobs. 28 were intrastate and 24 interstate.

In the case of Garcia there were 55 intrastate and 8 interstate.

Q. That is all of the men in the suit? A. No. That is all that drove and helped on the vans in this particular month." [R. 286, 287.]

This testimony concerning the activities of the named appellees (plaintiffs) is representative of the activities of all of the appellees and, considered in connection with the testimony of the appellees themselves, shows beyond question that appellees were engaged in work involving safety of operations in interstate commerce a substantial part of their time. Moreover, the Court's finding that 44⅔% of appellant's business was interstate [Finding No. IV, R. 14-15], confirms generally the testimony above quoted.

In view of all the testimony quoted, or adverted to, *supra,* there can be no doubt that appellees were engaged in work and activities involving safety of operations in interstate commerce, hence they were exempt from the overtime provisions of the Fair Labor Standards Act of 1938. (29 U. S. C. A. Section 213(b)(1).)

III.

Where a Shipper Intends That His Goods Shall Move Across a State Line, the Hauling of Such Goods by Motor Truck to Common Carrier Terminals Pursuant to Such Intention Constitutes a Movement in Interstate Commerce.

The record shows that a substantial part of the goods handled by appellant for its customers was intended by them to be shipped to other states or to foreign countries. The intention of the shipper is controlling, and the hauling of his goods to a railroad depot or other carrier terminal is a part of the stream of interstate commerce. This principle of law, with citation of authority, is stated in *Dallum v. Farmers' Co-Operative Trucking Ass'n.,* 46 Fed. Supp. 785, at page 788, as follows:

> "The intention of the original shipper to move these goods across state lines to definite interstate destinations is established in the evidence by the shipping directions issued in connection with each shipment. The movements of the goods by the defendant and other carriers was done in the performance of a preconceived intention to transport said goods to interstate destinations. There was a practical continuity in the movements.
>
> "The courts have repeatedly held that such characteristic movements and handling of goods constitute shipments in interstate commerce. United States *et al.* v. Erie Railroad Company, *et al.,* 280 U. S. 98, 50 S. Ct. 51, 74 L. Ed. 187; Hughes Brothers Timber Company v. Minnesota, 272 U. S. 469, 47 S. Ct. 170, 71 L. Ed. 359; Philadelphia & Reading Railway Company v. Hancock, 253 U. S. 284, 40 S. Ct. 512, 64 L. Ed. 907; Baltimore & Ohio Southwestern Railroad Company v. Settle *et al.,* 260 U. S. 166, 43 S. Ct.

28, 67 L. Ed. 189; Meyers v. Railroad Commission, 218 Cal. 316, 23 P. (2d) 26, decided June 1, 1933; Buckingham Transportation Co. of Colorado, Inc. v. Black Hills Transportation Co., *et al.,* 66 S. D. 230, 281 N. W. 94, decided Aug. 13, 1938; Railroad Commission of Ohio v. Worthington, 225 U. S. 101, 32 S. Ct. 653, 56 L. Ed. 1004; Wm. E. Rush Common Carrier Application, M. C. C., Volume 17, 661, decided August 9, 1939.

"The fact that several carriers participated in the movement, that different modes of transportation were used, and that rebilling from intermediate points was required, does not destroy the continuity of movement, nor does it destroy its interstate character. See Hughes Brothers Timber Company v. Minnesota, *supra.*"

The principle announced, *supra,* has been held to apply when the goods are started on their journey although still in the possession of the consignor. (See, *Pennsylvania R. R. Co. v. Public Utilities Commission,* 298 U. S. 155, 56 S. Ct. 685, 689; *Hughes Bros. Co. v. Minnesota,* 272 U. S. 469, 475, 47 S. Ct. 170; *Champlain Realty Co. v. Brattleboro,* 260 U. S. 366, 43 S. Ct. 146.)

And, interstate commerce continues until such goods come to rest in the state of destination either in the hands of the consignee, or in a warehouse, no further movement in interstate commerce being contemplated. (See, *Ripscomb v. Socony Vacuum Corp.,* 87 F. (2d) 26; and cases cited, at page 267.)

Conclusion.

The trial court committed reversible error in holding: First, that appellant was not a service establishment the greater part of whose servicing was in intrastate commerce and that appellees were not engaged in such an establishment; and Second, that appellees were not engaged in activities, a substantial part of their time, involving safety of operations in interstate commerce. The evidence shows the contrary.

The judgment should be reversed.

Respectfully submitted,

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APPENDIX A.

Applicable Provisions of Fair Labor Standards Act of 1938.

Section 6 of said Act (29 U. S. C. A., Section 213) provides, in part:

"(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

"(1) during the first year from the effective date of this section, not less than 25 cents an hour;

"(2) during the next six years from such date, not less than 30 cents an hour;

"(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 208 of this title, whichever is lower, and

"(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 208 of this title, . . ."

Section 7 of said Act (29 U. S. C. A., Section 207), provides, in part:

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section;

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 13 of said Act (29 U. S. C. A., Section 213) provides, in part:

"(a) The provisions of sections 206 and 207 of this title shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); *or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce;* * * * (Italics ours.)

"(b) The provisions of section 207 of this title shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49."

Section 16 of said Act (29 U. S. C. A., Sec. 216) provides, in part:

"(b) Any employer who violates the provisions of Section 206 or Section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional

equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself of themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

Applicable Provisions of Motor Carrier Act.

The Motor Carrier Act (49 U. S. C. A. Supp., Section 304), provides, in part:

"(a) *Powers and duties generally.* It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, *qualifications and maximum hours of service of employees, and safety of operation and equipment.*" (Italics ours.)

The Act (Section 204 (b) and (c)) contains similar provisions in respect to contract carriers by motor vehicle and private carriers of property by motor vehicle.